A

INVESCOR SDN BHD

v.

SOBENA MAJU SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
JAMES FOONG JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-243-1999]

C

18 SEPTEMBER 2007

CONTRACT: *Deposit/earnest money - Forfeiture - Termination of joint venture agreement to develop land in consideration of RM15 million as security deposit - Sum of RM200,00 paid - Whether deposit or part*

D *payment - Whether vendor entitled to 10% of security deposit less RM200,000 paid*

The respondent was the registered proprietor of two parcels of land (the 'land'). The appellant entered into a joint venture

E agreement (the 'agreement') with the respondent to develop the land. In consideration thereof, the appellant agreed to pay the respondent a sum of RM15 million as security deposit. Under cl. 2 of the agreement, that sum was to be paid in the following manner: RM200,000 upon execution of the agreement and the

F balance of 14.8 million within 100 days from the date of the agreement. In the event the appellant failed to pay the balance sum within the stipulated period the respondent was entitled to terminate the agreement. It was agreed that payment of the security deposit was deemed to be unconditional payment of the

G respondent's share in the project. It was further agreed that after the buildings on the land were erected, the respondent was entitled to a 10% discount on the price of the buildings offered for sale to the public. If that entitlement was not exercised at the final phrase of the development, the security deposit shall be

H deemed as full satisfaction of the respondent's right and interest in the land. It followed that the appellant paid RM200,000 but failed to pay the balance of 14.8 within the stipulated time.

The respondent filed an action against the appellant claiming

I payment of 10 % of the security deposit of RM15 million, *ie*, RM1.5 million less RM200,000 paid under the agreement. The appellant in its defence and counterclaim submitted that the respondent breached a fundamental term in the agreement by

awarding a contract to one PPM Sdn Bhd ('PPM') to build houses on the land thereby depriving the appellant the exclusive right to develop the same. Further, the appellant breached its fiduciary duty to the appellant in not disclosing the PPM agreement. In addition there was a consensus between them to reduce the security deposit to RM10.5 million instead of RM15 million. That estopped the respondent from reverting to and relying upon the agreement.

The trial judge allowed the respondent's claim on the following grounds: (1) that the agreement was revoked by the appellant soon after it was signed and there was a board resolution and a deed executed to that effect; (2) there were proposals by the appellant to reduce the security deposit and the respondent had not accepted them thereby implying that the appellant was trying to evade paying the balance of the security deposit; and (3) the respondent was entitled to treat the agreement as having been terminated by the appellant since the appellant failed to pay the balance of the security deposit. Hence, the appellant's appeal.

Held (dismissing the appeal by majority)
Per Zainun Ali JCA with Mokhtar Sidin JCA concurring (majority):

(1) There was a misconception on the appellant's part with regard to the contract with PPM. That contract was not an encumbrance binding on the land but a personal obligation. In any case, that contract with PPM was inchoate, subject to further terms and conditions. (para 91)

(2) It was clear that the appellant was either unsure of what to do after signing the agreement or that it was in a dilemma of sorts after obtaining legal opinion from the law firm concerned. The appellant's witness also could not give an intelligible reply during cross-examination as to why the appellant had wanted to revoke the agreement on the same day it was signed. The appellant could have exercised any of its available options if it truly believed that the respondent was in breach of the agreement. Instead the appellant applied to re-negotiate new terms especially towards payment of the security deposit. (paras 93, 94 & 95)

(3) The appellant had asked for several extensions to pay the balance of the security deposit in which fixed extensions were given. When no payment was forthcoming, the appellant proposed changes to the agreement that the respondent rejected. The continued negotiations did not alter the appellant's primary obligations in the agreement but merely postponed it. So when no payment was made, the respondent demanded the payment of the balance of the security deposit within 14 days that made time the essence of the contract. (paras 96, 100)

(4) By making the proposal for the execution of a new joint venture agreement on new terms and conditions the appellant clearly evinced an intention that it was not able to and did not perform the earlier agreement. That amounted to a clear repudiation. Yet the appellant did not repudiate the agreement. (para 102)

(5) The authorities show that where the deposit sum is unpaid, the respondent can still terminate, forfeit and sue to recover that sum. In the circumstances, the respondent could rightly sue for recovery of the deposit even though it remained unpaid. (paras 110 & 111)

(6) The title of the land carried a restriction that there could be no charge or transfer without the state consent. There were also provisions in the agreement that enabled the appellant to deal effectively with the land with third parties. By those acts the respondent could or would have lost the land in the event of the appellant's default. The land would not be reverted to the respondent since the rights of third parties would have intervened. In that context, it was no surprise that the agreement provided that the entire consideration had to be paid as a security deposit so as to protect the respondent against any default by the appellant and consequent loss of the land. Given the risk that the respondent was exposed to, there was nothing unusual in the amount of RM15 million being agreed by both parties as a "security deposit". (paras 115, 116, 117, 118 & 119)

(7) The question was whether the RM1.5 million was a true deposit. The word "true deposit" means a deposit that is within the bounds of an earnest performance. If a deposit is a true deposit, it will be forfeited to the vendor if the purchaser

wrongfully failed to perform his part of the bargain. That was even so if the vendor's loss is less than the deposit. The test normally accepted to ascertain whether a sum is earnest money and deemed a true deposit is where it represents 10% of the purchase price of the land. In the present case, whether 10% of the security deposit is a true deposit depends on the construction of the contract between the parties. (paras 121, 122, 123 & 124)

(8) The payments to be paid were not part payments but an earnest to bind the bargain entered into. The RM1.5 million represented a true deposit and the respondent was entitled to forfeit the sum when the appellant failed to comply with cl. 2(a) of the agreement. An express provision of forfeiture in the agreement was not relevant. This was a contract of sale where a deposit being an earnest for performance of a contract conferred a consequential right of forfeiture (subject to its terms and conditions). (paras 141, 142, 143 & 144)

(9) The 10% sum to be forfeited from the amount of RM15 million was reasonable. It is conventionally accepted that a deposit of 10% is a true deposit. A deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance. It followed that the respondent was entitled to a forfeiture of 10% of the total consideration of RM15 million discounting the RM200,000 already paid. (paras 151, 152, 153 & 154)

Per James Foong JCA (dissenting):

(1) Although there was no reasonable explanation offered to the existence of the appellant's resolution and the deed of revocation of the agreement, both parties continued to treat and consider the agreement as valid and subsisting. That was right up to the termination of the agreement that was many years after the said documents were documented. Such acts vitiated any adverse effect the said documents had on the agreement. The trial judge's reasoning in that matter was disagreed with. (para 18)

(2) The facts showed that the PPM agreement would not have affected the exclusive right of the appellant in developing the land under the agreement. The appellant also had agreed to accept PPM as the main contractor of the land. Since the

A appellant had accepted and adopted the PPM agreement, the appellant's claim that the respondent had breached its fiduciary duty to the appellant by not disclosing the PPM agreement was no longer sustainable. The appellant had acquiesced to it. (paras 24, 25, 26, 27, 28 & 29)

B

(3) The appellant's claim of an actionable misrepresentation was never pleaded. Even if pleaded, the appellant had elected to treat the agreement as subsisting from the time the PPM agreement was discovered until the time when the respondent C gave written notice to the appellant to pay up the balance of the security deposit within a specified period. As the appellant had accepted the PPM agreement, the appellant's right to mount a claim under that cause of action was nullified. (paras 30 & 31)

D

(4) It was the appellant that had breached the agreement and not the respondent. The appellant had failed to pay the balance of the security deposit within the stipulated time and despite indulgence by the respondent continued to breach that obligation until the termination of the grace period of 14 days E given by the respondent in its letter of demand. Once the 14-day period expired, the agreement was considered unlawfully terminated by the appellant. (para 32)

(5) The agreement was in fact an outright sale and purchase of F the land rather than one of a joint venture to develop the same. The purchase price must be the RM15 million. It was agreed that RM200,000 was to be paid upon execution of the agreement and RM14.8 million within 100 days thereafter. That entire method of payment must inevitably be construed G as payment in parts with no deposit. When the amount was meant to be a part payment then going by the authorities of *Linggi Plantations Ltd v. Jagatheesan*, *Mayson v. Clouet* and *Howe v. Smith*, it could not be subjected to forfeiture. The innocent party is only entitled to sue for damages for breach H of contract and damages has to be proved. (paras 44, 45 & 46)

(6) Instead of proving actual damage or reasonable compensation for the actual loss, the respondent chose to tag it to 10% of I RM15 million and called no further evidence. Whether that was permitted required an examination of the evidence to determine whether it fell within the exception expressed in

Selva Kumar v. Thiagarajah, *ie*, whether the facts were within the limited or restricted situation where the court found it difficult to assess damages for the actual loss or damage. The circumstances of the case did not fall within the stated exception. (paras 47 & 50)

(7) No deposit was mentioned in the present case and when actual loss or damage could be quantified by known and established measures then in absence of evidence thereof, the respondent's claim for an aggregated sum of 10% of the consideration should not be allowed. If at all any sum was to be forfeited, it would be the RM200,000 which was paid at the time of the execution of the agreement. That could be considered as deposit or earnest money (*Selva Kumar v. Thiagarajah*). (para 51)

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah pemilik berdaftar dua bidang tanah ('tanah'). Perayu telah memeterai perjanjian usahasama dengan responden ('perjanjian') bagi membangunkan tanah, dan sebagai balasannya akan membayar deposit jaminan berjumlah RM15 juta kepada responden. Di bawah perenggan 2 perjanjian, wang tersebut hendaklah dibayar seperti berikut: RM200,000 ketika perjanjian dimeterai dan baki RM14.8 juta dalam tempoh 100 hari dari tarikh perjanjian. Dinyatakan bahawa sekiranya perayu gagal membayar baki pembayaran dalam tempoh yang ditetapkan, maka responden berhak untuk menamatkan perjanjian. Juga dipersetujui bahawa pembayaran deposit jaminan tersebut hendaklah dianggap sebagai pembayaran tak bersyarat bahagian responden di dalam projek. Pihak-pihak selanjutnya bersetuju bahawa selepas bangunan-bangunan didirikan, responden berhak kepada 10% diskaun ke atas harga bangunan yang ditawarkan untuk jualan kepada orang awam. Bagaimanapun, jika di fasa akhir pembinaan hak tersebut tidak dimanfaatkan, maka deposit jaminan akan dianggap sebagai pemuasan sepenuhnya hak-hak dan kepentingan responden di dalam tanah. Apa yang berlaku ialah perayu telah membayar RM200,000 tetapi gagal membayar baki RM14.8 juta dalam tempoh yang ditetapkan.

Responden telah memfail tindakan terhadap perayu menuntut pembayaran 10% dari deposit jaminan RM15 juta tersebut, iaitu sejumlah RM1.5 juta kurang RM200,000 yang sudah pun dibayar perayu di bawah perjanjian. Dalam pembelaan dan tuntutan

balasnya, perayu berhujah bahawa responden telah memungkiri terma penting perjanjian bilamana ia mengawardkan kontrak kepada sebuah syarikat lain, PPM Sdn Bhd ('PPM'), untuk membina rumah-rumah di atas tanah sekaligus menafikan hak ekslusif perayu untuk membangunkan tanah. Responden juga dikata telah memungkiri tanggungjawab fidusiarinya terhadap perayu apabila gagal mendedahkan mengenai perjanjian PPM. Selain itu, terdapat persetujuan di antara mereka untuk mengurangkan deposit jaminan dari RM15 juta kepada RM10.5 juta. Menurut perayu, semua ini telah menghalang responden dari membangkitkan atau bergantung kepada perjanjian.

Hakim bicara telah membenarkan tuntutan responden atas alasan-alasan berikut: (1) bahawa perjanjian telah dibatalkan oleh perayu sejurus selepas ia ditandatangani dan terdapat resolusi lembaga pengarah dan satu suratikatan juga dilaksanakan untuk maksud itu; (2) terdapat anjuran oleh perayu bagi mengurangkan deposit jaminan tetapi tidak diterima oleh responden sekaligus menunjukkan bahawa perayu cuba mengelak diri dari membayar baki deposit jaminan; dan (3) responden berhak untuk menganggap perjanjian sebagai telah ditamatkan oleh perayu disebabkan kegagalan perayu membayar baki deposit jaminan. Perayu telah merayu.

Diputuskan (menolak rayuan melalui keputusan majoriti)
Oleh Zainun Ali HMR dengan Mokhtar Sidin HMR menyetujui (majoriti):

(1) Terdapat salah tanggap di pihak perayu mengenai kontrak dengan PPM. Kontrak tersebut bukan suatu penghalang yang mengikat tanah tetapi adalah suatu obligasi persendirian. Walau apapun, kontrak dengan PPM tersebut masih belum sempurna, dan tertakluk kepada terma dan syarat.

(2) Adalah jelas bahawa perayu tidak pasti apa yang perlu dibuat selepas menandatangani perjanjian atau berada dalam keadaan dilema selepas memperoleh nasihat undang-undang dari firma guaman yang berkenaan. Saksi perayu juga gagal memberikan jawapan yang wajar semasa soalan balas tentang mengapa perayu ingin membatalkan perjanjian pada hari yang sama ia ditandatangani. Perayu boleh sahaja melaksanakan mana-mana opsyen yang terbuka baginya jika ia sebenarnya mempercayai bahawa responden telah memungkiri perjanjian. Perayu sebaliknya memohon untuk merunding semula beberapa terma baru terutama mengenai pembayaran deposit jaminan.

(3) Perayu telah meminta beberapa penangguhan untuk membayar baki deposit jaminan di mana penangguhan diberi bagi satu tempoh yang tetap. Apabila tiada bayaran dibuat, perayu mencadangkan perubahan kepada perjanjian tetapi ditolak oleh responden. Rundingan yang berterusan tidak mengubah obligasi utama perayu di dalam perjanjian tetapi hanyalah menangguhkannya. Jadi, apabila tiada bayaran dibuat, responden menuntut bayaran baki deposit jaminan dalam masa 14 hari sekaligus menjadikan masa intipati kontrak.

(4) Dengan membuat cadangan untuk melaksanakan satu perjanjian usahasama baru di atas terma-terma dan syarat-syarat yang baru, perayu jelas menunjukkan niat bahawa ia tidak berupaya untuk dan tidak akan melaksanakan perjanjian terdahulu. Itu jelas suatu penolakan. Namun, perayu tidak menolak perjanjian.

(5) Autoriti-autoriti menunjukkan bahawa di mana jumlah deposit tidak dibayar, responden masih boleh menamatkan perjanjian, merampas jumlah tersebut atau pun memulakan guaman bagi mendapatkannya. Oleh hal yang demikian, responden boleh sahaja mendakwa untuk mendapatkan deposit walaupun ia masih belum dibayar.

(6) Geran hakmilik tanah tertakluk kepada larangan bahawa ia tidak boleh digadai atau dipindahmilik tanpa keizinan pihak berkuasa negeri. Juga terdapat peruntukan di dalam perjanjian yang membolehkan perayu berurusan dengan tanah secara berkesan dengan pihak ketiga. Jika ini berlaku responden mungkin dan boleh kehilangan tanah sekiranya perayu tersilap langkah. Tanah tidak akan dikembali kepada responden kerana pihak-pihak ketiga akan masuk campur. Dalam konteks ini, adalah tidak mengejutkan bahawa perjanjian memperuntukkan bahawa keseluruhan balasan hendaklah dibayar sebagai deposit jaminan bagi melindungi responden dari apa-apa salah laku perayu dan kehilangan tanah. Mengambilkira risiko yang dihadapi responden, tiada peliknya mengenai jumlah sebanyak RM15 dipersetujui oleh pihak-pihak sebagai "deposit jaminan".

(7) Persoalannya adalah sama ada wang berjumlah RM1.5 juta tersebut merupakan deposit sebenar. Perkataan "deposit sebenar" bermaksud deposit dalam lengkongan satu pelaksanaan yang sungguh-sungguh. Jika sesuatu deposit itu merupakan deposit sebenar, maka ia akan dirampas untuk

manfaat penjual jika pembeli dengan secara salah gagal melaksanakan bahagian tanggungjawabnya. Itu akan dilakukan walaupun kerugian penjual kurang dari jumlah deposit. Ujian yang biasa diterimapakai bagi menentukan sama ada suatu jumlah itu adalah wang ehsan dan dianggap sebagai deposit sebenar adalah di mana ia mewakili 10% dari harga belian tanah. Dalam kes semasa, sama ada 10% deposit jaminan merupakan deposit sebenar bergantung kepada pentafsiran kontrak di antara pihak-pihak.

(8) Bayaran yang harus dibayar bukanlah bayaran sebahagian tetapi adalah bayaran ehsan bagi mengikat tawar menawar yang telah dibuat. Jumlah RM1.5 juta itu adalah deposit sebenar dan responden berhak untuk merampas jumlah tersebut apabila perayu gagal mematuhi perenggan 2(a) perjanjian. Satu peruntukan expres tentang rampasan di dalam perjanjian adalah tidaklah relevan. Ini adalah satu kontrak jualan di mana deposit, yang bertindak sebagai tanda kepada pelaksanaan kontrak, telah memberikan hak konsekuential untuk merampas (tertakluk kepada terma-terma dan syarat-syaratnya).

(9) Jumlah 10% yang boleh dirampas dari jumlah RM15 juta adalah munasabah. Sudah menjadi kelaziman bahawa deposit 10% adalah merupakan suatu deposit sebenar. Deposit 10% dari harga belian adalah satu perkara biasa dan diterima dengan meluas oleh bidang komersial. Ianya mengikut bahawa responden berhak untuk merampas 10% dari jumlah keseluruhan balasan sebanyak RM15 juta setelah ditolak RM200,000 yang sudah dibayar.

Oleh James Foong HMR (menentang):

(1) Walaupun tiada penjelasan munasabah diberi berkaitan kewujudan resolusi perayu dan suratikatan pembatalan perjanjian, kedua-dua pihak masih lagi menganggap perjanjian sebagai sah dan berjalan. Keadaan ini berterusan sehinggalah perjanjian ditamatkan beberapa tahun selepas dokumen-dokumen tersebut didokumentasikan. Tindak tanduk ini telah menghapuskan apa jua kesan bertentangan yang dibangkitkan oleh dokumen-dokumen tersebut terhadap perjanjian. Taakulan hakim bicara dalam soal ini tidak dapat dipersetujui.

(2) Fakta menunjukkan bahawa perjanjian PPM tidak mempunyai kesan terhadap hak ekslusif perayu untuk membangunkan tanah di bawah perjanjian. Perayu telah bersetuju untuk menerima PPM sebagai kontraktor utama bagi tanah. Oleh kerana perayu telah menerima dan menggunapakai perjanjian PPM, tuntutan perayu bahawa responden telah memungkiri tanggungjawab fidusiarinya terhadap perayu kerana tidak mendedahkan perjanjian PPM tidak boleh dipertahankan. Perayu telah memberi persetujuannya.

(3) Tuntutan salah representasi perayu tidak pernah diplidkan. Jikapun diplidkan, perayu telah memilih untuk menganggap perjanjian sebagai masih berjalan sejak dari terdedahnya perjanjian PPM sehinggalah ke masa bilamana responden memberi notis bertulis kepada perayu untuk membayar baki deposit jaminan dalam tempoh tertentu. Oleh kerana perayu telah menerima perjanjian PPM, maka hak perayu untuk membuat tuntutan di bawah kausa tindakan tersebut telah menjadi terbatal.

(4) Perayu sendiri yang telah memungkiri perjanjian dan bukannya responden. Perayu gagal membayar baki deposit jaminan dalam tempoh yang ditetapkan, dan walaupun diberi masa oleh responden, masih terus memungkiri obligasinya itu sehingga tempoh lanjutan 14 hari yang diberikan oleh responden ditamatkan oleh surat tuntutan responden. Sebaik tempoh 14 hari tersebut tamat, perjanjian dianggap sebagai telah ditamatkan secara tak sah oleh perayu.

(5) Perjanjian sebenarnya suatu perjanjian jual beli tanah dan bukannya suatu perjanjian usahasama untuk membangunkan tanah. Harga beliannya adalah RM15 juta. Adalah dipersetujui bahawa RM200,000 hendaklah dibayar sewaktu pemeteraian perjanjian dan RM14.8 juta dalam tempoh 100 hari selepas itu. Keseluruhan kaedah pembayaran ini semestinyalah dianggap sebagai pembayaran sebahagian tanpa apa-apa deposit. Bilamana pembayaran dihasratkan sebagai suatu pembayaran sebahagian, maka berdasarkan autoriti-autoriti *Linggi Plantations Ltd v Jagatheesan*, *Mayson v. Clouet* dan *Howe v Smith*, ia tidak boleh tertakluk kepada perampasan. Pihak yang tidak bersalah hanya boleh mendakwa untuk gantirugi kerana kemungkiran kontrak sementara kerugian pula haruslah dibuktikan.

(6) Responden gagal membuktikan kerugian sebenar atau pampasan yang munasabah untuk kerugian sebenar, dan sebaliknya memilih untuk terikat kepada 10% dari RM15 juta tanpa memanggil keterangan-keterangan lain. Sama ada ini dibenarkan bergantung kepada penelitian keterangan-keterangan bagi mempastikan sama ada ia termasuk ke dalam pengecualian seperti yang dibentang di dalam *Selva Kumar v. Thiagarajah*, iaitu sama ada fakta-fakta berada dalam keadaan terhad di mana mahkamah mendapatinya sukar untuk menilai kerugian bagi kehilangan atau kerugian sebenar. Halkeadaan kes ini tidak terangkum ke dalam pengecualian yang dinyatakan.

(7) Tiada deposit disebutkan di dalam kes semasa. Dan bilamana gantirugi atau kerugian sebenar boleh ditentukan melalui langkah-langkah mantap yang diketahui, maka ketiadaan keterangan mengenainya akan menyebabkan tuntutan responden untuk agreget 10% dari balasan tidak boleh dibenarkan. Jika ada mana-mana jumlah yang boleh dirampas, ia adalah jumlah RM200,000 yang telah pun dibayar sewaktu perjanjian dimeterai. Itu boleh dianggap sebagai deposit atau wang ehsan (*Selva Kumar v. Thiagarajah*).

Case(s) referred to:

Bot v. Ristevski [1981] V R 120 ***(refd)***
Chaplin v. Hicks [1911] 2 KB 286 ***(refd)***
Damon Cia Naviera SA v. Hapag-Lloyd International SA [1985] 1 All ER 475 ***(refd)***
Ex p Barrel LR 10 Ch 512 ***(refd)***
Fibroska Spolka Keyjna v. Fairbairn [1943] ***(refd)***
Hadley v. Baxendale [1854] 9 Exch 341 ***(refd)***
Howe v. Smith [1884] 27 Ch D 89 ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2005] 2 CLJ 914 CA ***(refd)***
Karuppiah v. Petaling Garden Co Sdn Bhd [1972] 1 MLJ 173 ***(refd)***
Koh Siak Poo v. Sayang Plantation [2002] 1 CLJ 501 CA ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 ***(refd)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***
Pendergrast v. Chapman [1988] 2 NZLR 177 ***(refd)***
Polyset Ltd v. Panhandat Ltd [2002] 3 HKLRD 319 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Soper v. Arnold & Anor [1889] 14 AC 429 ***(refd)***
Sun Properties Sdn Bhd v. Happy Shopping Plaza [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 26, 40, 65, 66, 74, 75

For the appellant - GK Ganesh (Philip Chong & Manjit Singh with him); M/s Philip Chong & Co
For the respondent - Dato' RR Sethu; M/s RR Sethu

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22-366-1989]

Reported by Usha Thiagarajah

JUDGMENT

James Foong JCA:

Introduction

[1] The brief and pertinent facts of this case are these: The respondent was the registered proprietor of two parcels of land held under H.S (D) 53373 for lot P.T. 2202 in the Mukim of Petaling, Daerah Wilayah Persekutuan, and H.S (D) 53372 for lot P.T. 5 Sek. 7, Pekan Sungai Besi, Daerah Wilayah Persekutuan ("the land"). On 20 November 1987, the respondent entered into a sort of joint venture agreement ("the agreement") with the appellant where the respondent allowed the appellant to "develop the said land by building thereon various types of buildings together with infrastructures common facilities convenience and other amenities in accordance with plans to be approved by the relevant authorities and subject to the terms and upon the conditions hereafter contained". In consideration for this, the appellant has to pay the respondent a sum of RM15 million as security deposit. Under cl. 2 of the agreement, this sum is to be paid in the following manner: RM200,000 upon execution of the agreement and the balance of RM14.8 million within 100 days from date of the said agreement. In the event of the appellant failing to pay this balance sum within the period as stipulated, "the landowner shall be entitled by notice in writing to the developer to terminate this agreement". The agreement then went on to say that the "payment of the Security Deposit shall be deemed to be unconditional payment of the landowner's share in the Joint Venture Project payable by the developer to the landowner upon due observance and performance by the developer of all the covenants stipulations and undertakings on its part to be observed and performed herein". And under cl. 13 of the agreement, it is

A stipulated that after the buildings on the said land are erected, the respondent is entitled to a 10% discount on the price of the buildings offered for sale to the public and if this entitlement is not exercised at the final phase of the development, the security deposit "shall be deemed in full satisfaction of the landowner's B right and interest in the said land".

[2] Crafted in this manner, I agree with Dato R.R. Sethu, counsel for the respondent, that this agreement though termed as a joint venture agreement is in actual fact a sale and purchase of C the said land. The importance of this will become apparent when dealing with the issue of the forfeiture of 10% of the purchase price due to the failure of the appellant to pay to the respondent the balance sum of RM14.8 million, a fact which is not in dispute.

D **[3]** Subsequent to the execution of the agreement, the appellant attempted to secure a bank loan to pay the respondent the balance of RM14.8 million. In the course of this, it was discovered that the said land was caveated by a company known as Pembinaan dan Permaju Mahajiwa (Selangor) Sdn Bhd (PPM Sdn Bhd). The ground for the lodgment of this caveat was that E PPM Sdn Bhd had given a loan of RM442,914 to the respondent in consideration of the respondent agreeing to appoint PPM Sdn Bhd as the main contractor to build houses on the said land. There was a written agreement dated 26 May 1987 ("PPM Agreement") between the parties to this effect.

F **[4]** This PPM Agreement is the major ground relied on by the appellant to dispute the respondent's claim in this case and it is the foundation of its counterclaim against the respondent; a matter which will become apparent later.

G **[5]** On 6 April 1989, when the appellant failed to pay the balance of RM14.8 million, the respondent by letter to the appellant demanded payment of this sum within 14 days failing which the agreement will be terminated, and "the sum equivalent H to 10% of the security deposit forfeited".

[6] The appellant responded by letter on 19 April 1989 stating *inter alia* that:

I

> the Joint Venture Agreement was not proceeded with by reason of your failure to surrender the Document of Title to the Bankers and for the rescission of the contract you have entered into with Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd and further you have failed to refund the sum of RM300,000.00 to us by 12th June, 1988.
>
> Further in November 1988 we were informed by all the Shareholders of your Company that you were in the position once again to enter into a Joint Venture with us at $10.5 million subject to the terms and conditions which have subsequently been set out in our letter of 28th March, 1989.

[7] The sum of RM300,000 mentioned in this letter was associated with a purported loan of RM200,000 which was supposed to be given by the appellant to the respondent to pay for the quit rent for the said land. Though the agreement stipulates that this responsibility falls on the appellant, the appellant failed to carry out this obligation. Instead, it resorted to lend the respondent a sum of RM200,000 on condition that some shareholders of the respondent would deposit their share certificates in the respondent with the appellant. Despite this being complied with by the respondent's shareholders, the sum of RM200,000 was never advanced by the appellant to the respondent. Eventually, when a new group of shareholders took control of the respondent, these shares certificates were recovered from the appellant in pursuant to an order of the court.

[8] After the new shareholders of the respondent took control of the respondent they treated the appellant as having terminated the agreement and proceeded to pay the quit rent, sort out some matters relating to the documents of title to the said land, and then developed the said land into a housing estate. They also instituted this action against the appellant.

Respondent's Claim

[9] In the claim filed by the respondent against the appellant, the respondent alleged that as a result of the appellant's unlawful termination of the agreement, the respondent should be compensated a sum of RM1.2 million being 10% of the security deposit of RM15 million less RM200,000 paid under the agreement. Aside from this, there should be interest at 8% per annum thereon from 6 April 1989 to date of realization and costs.

A

Appellant's Defence & Counterclaim

[10] The appellant's defence repeated substantially what was stated in its letter to the appellant on 19 April 1989 which blamed the respondent for breaching a fundamental term in the
B agreement in awarding a contract to PPM Sdn Bhd to build houses on the said land. This, the appellant claimed, deprived the appellant of the exclusive right to develop the said land. Further, the appellant asserted that the respondent has breached its fiduciary duty to the appellant in not disclosing to the appellant
C the PPM Agreement when the agreement was executed. In addition, there was consensus between the parties to reduce the security deposit to RM10.5 million instead of RM15 million. This, according to the appellant "estopped (the respondent) from reverting to and relying upon the original terms of the joint venture
D agreement". By maintaining that the agreement is still effective, the respondent counterclaim that the respondent should specifically perform the agreement and prior to that be restrained from acting to the contrary. Aside from this, the respondent should also pay damages for breach of the agreement and fiduciary duty.

E

Decision Of The Trial Judge

[11] In allowing the respondent's claim and dismissing the appellant's counterclaim, the learned trial judge provided the following reasons:

F

1. The agreement was revoked by the appellant soon after it was signed. There was a board resolution of the appellant and a deed executed by the appellant to this effect and the appellant could not offer any reasonable explanation for the
G existence of these documents.

2. Though there were proposals by the appellant to reduce the security deposit, the respondent had not accepted them. Such attempts imply that the appellant was trying to evade paying the balance of the security deposit.

H

3. Since the appellant has failed to pay the balance of the security deposit, and the quit rent to the said land, the appellant had committed a breach of the agreement which entitled the respondent to treat the agreement as having been
I terminated by the appellant.

[12] Dissatisfied with this outcome, the appellant appealed to us.

Appellant's Argument

[13] Mr. G.K Ganesan, counsel for the appellant, submitted that there was a total failure of consideration in the agreement caused by the existence of the PPM Agreement which is "substantially the same, if not identical" with the terms of the agreement. This deprived the appellant of its exclusive right to develop the said land which was the appellant's main benefit in this transaction. Since the respondent could not perform its obligation to deliver to the appellant this exclusive right there was failure of consideration in the agreement. Alternatively, by failing to deliver to the appellant this exclusive right to develop the said land, the respondent had committed a fundamental breach in the agreement thereby rendering the agreement void or voidable. Void under s. 26 of the Contracts Act which says that "an agreement made without consideration is void", and voidable under s. 40 of the Contracts Act which says that when a party has refused or disabled himself from performing his promise in its entirety, the innocent may put an end to the contract unless he has acquiesced to its continuance. For the latter, the appellant has two options: either to treat "the contract as having come to an end (void) and seek the refund (restitution) of all monies paid (restitution), or he may reset his claim on the basis of the contract and seek damages for breach" under s. 74 of the Contracts Act. Because the appellant possesses such options, the respondent is not entitled to forfeit any money of the appellant, paid or to be paid under the agreement.

[14] Next, Mr. Ganesan turned to the appellant's claim of a breach of fiduciary duty owed by the respondent to the appellant in failing to disclose to the appellant at the time of the execution of the agreement the existence of the PPM Agreement. He said that the respondent, as a joint venture partner with the appellant, should have been true and honest with the appellant.

[15] Finally, Mr. Ganesan claimed that the respondent's conduct in concealing the PPM Agreement from the appellant amounted to an actionable misrepresentation making the agreement voidable.

Issues

[16] From the above, the following are the issues for determination in this appeal:

A 1. What is the effect of the appellant's resolution and deed of revocation of the agreement?

2. Was there a total failure of consideration or breach by the respondent of a fundamental term in the agreement?

B 3. Was there a breach of fiduciary duty by the respondent?

4. Was there an actionable misrepresentation?

5. If the above is answered in the negative, is the respondent C entitled to claim forfeiture of a sum equivalent to 10% of the consideration stated in the agreement?

[17] I will consider each of these in turn.

Analysis

D

1. Are The Appellant's Resolution And The Deed Of Revocation Of The Agreement Of Any Effect?

[18] As the trial judge has found the appellant's own resolution E and deed of revocation of the agreement to be a ground for allowing the respondent's claim and dismissing the appellant's counterclaim, it is necessary to deliberate on it. I agree that there was no reasonable explanation offered to the existence of these documents, nevertheless both parties continued to treat and F consider the agreement as valid and subsisting. This was right up to the termination of the agreement which was many years after these documents were executed. Such acts vitiate any adverse effect these documents have on the agreement. On this ground, I disagree with the learned trial judge's reasoning in arriving at her G conclusion over the matter.

2. Was There A Total Failure Of Consideration Or Breach By The Respondent Of A Fundamental Term In The Agreement?

[19] To ascertain this, it is necessary at the outset to examine H the terms of the PPM Agreement since it is due to this impugned contract that the appellant's contentions are founded. This document consists of only 10 clauses and a short schedule. I shall just disclose the pertinent terms.

I **[20]** Clause 1 of the operative part declares that the respondent "agrees to appoint the contractor (PPM Sdn Bhd) as its main contractor for the said development subject to the terms and conditions hereinafter contained".

[21] Clause 2 provides that upon execution of the agreement, PPM Sdn Bhd is to advance a friendly loan of RM442,914 to the respondent and this loan is "to be utilized towards purchase of the said land and is repayable to the contractor within six (6) months from date hereof". A

[22] Clause 3 states that contract works "shall be as specified in schedule B upon a mutually agreed contract sum", and schedule B listed out the type of buildings and infrastructure to be constructed on the said land. B

[23] Clause 7 says that "Notwithstanding the full repayment of the said loan, the other provisions herein provided shall continue thereafter to submit *(sic)* for as long as may be necessary for the purpose of giving full effect to each and every provision in accordance with the terms of this agreement". C

[24] Against the facts as presented, I do not think that this PPM Agreement would have affected the exclusive right of the appellant in developing the said land as specified under the terms of the agreement. The reasons are as follows: D

[25] First, PPM Sdn Bhd was only appointed as a contractor to build on the said land as compared to the appellant who was the developer. As a developer, the appellant has absolute right and control over the nature of the development (subject of course to the approval of the relevant authorities) and the price of the houses or buildings to be sold. PPM Sdn Bhd has no say on all of these. Under the PPM Agreement, PPM Sdn Bhd's role was only to construct and build on the said land and even the cost of construction had to be "mutually agreed" upon. And if this could not be agreed, there was no obligation upon the respondent or its successor in title to be bound with the services of PPM Sdn Bhd. It is therefore apparent that this PPM Agreement does not affect the appellant's exclusive right to develop the said land as provided by the agreement. E F G

[26] Second, the appellant had agreed to accept PPM Sdn Bhd as the main contractor for the said land in April of 1988. This is reflected in the respondent's letter to the appellant on 11 April 1988 (p. 262 of the appeal record) which reads: H I

> This is to inform and confirm that at the said meeting, Dato' Chan requested for a 2 months extension to finalise the loan documentation and disbursement and Dato' Chan had agreed that Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd ("Mahajiwa") will be retained/appointed as the main contractor for the project under the abovesaid Agreement.

[27] The appellant's solicitors, Ms Philip Choong & Co's reply to the respondent on 13 April 1988 (see p. 264 of the appeal record) confirmed this in this manner:

> we are instructed that our clients are prepared to acknowledge the Agreement entered into between you and Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd dated 26th May 1987 ... .

[28] By these actions, the appellant had acquiesced to the terms of the PPM Agreement and cannot now deny that the PPM Agreement had affected its exclusive right to develop the said land under the agreement.

Was There A Breach Of Fiduciary Duty By The Respondent?

[29] In view of the fact that the appellant had accepted and adopted the PPM Agreement, the appellant's claim that the respondent had breached its fiduciary duty to the appellant by not disclosing the PPM Agreement is no longer sustainable; the appellant has acquiesced to it.

Was There An Actionable Misrepresentation?

[30] On the appellant's claim of an actionable misrepresentation by the respondent, all that I need to say is that this matter was never pleaded. It is trite that when an issue is not pleaded, the court will not entertain it. Even if I were to consider this as pleaded the appellant had elected to treat the agreement as subsisting from the time the PPM Agreement was discovered till the time when the respondent gave written notice to the appellant to pay up the balance of the security deposit within a specified period. As disclosed above, the appellant had accepted the PPM Agreement.

[31] These nullify the appellant's right to mount a claim under this cause of action.

Conclusion On The Issue Of Liability

[32] For reasons above, on the issue of liability, I agree with the learned trial judge that it was the appellant who breached the agreement and not the respondent. The appellant had failed to pay the balance of the security deposit within the stipulated time and despite indulgence by the respondent continued to breach this obligation until the termination of the grace period given by the respondent's in its letter of demand of 6 April 1989. Once the 14 days period stated therein expired, the agreement was considered unlawfully terminated by the appellant.

Is The Respondent Entitled To Claim Forfeiture Of A Sum Equivalent To 10% Of The Consideration Stated In The Agreement?

[33] Though the appellant had breached the agreement, is the respondent entitled to claim a sum equivalent to 10% of the security deposit as compensation? Since the transaction between the parties was actually a sale and purchase of the said land, I treat this security deposit as the consideration for this sale and purchase. But before I proceed further, I must point out that what the respondent is claiming is not just money received but also a portion of that which has yet to be paid. The total amount claimed by the respondent is RM1.48 million which, according to Dato' Sethu, represents 10% of RM15 million after deducting RM200,000 received by the respondent from the appellant under the agreement. This, he said, is permitted by law. He cited *Karuppiah v. Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 173 and *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914 which allowed forfeiture of 10% of the deposit. Apart from these cases, he also cited *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 375 (SC) and *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89 PC which say that 10% of the consideration in an agreement is a reasonable figure to forfeit. He then proceeded to explain that in *Pendergrast v. Chapman* [1988] 2 NZLR 177, *Damon Cia Naviera SA v. Hapag-Lloyd International SA* [1985] 1 All ER 475, *Bot v. Ristevski* [1981] V R 120, and the Federal Court decision of *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23, the courts have ruled that "even where the deposit sum is unpaid, the plaintiff can terminate, forfeit and sue to recover that sum".

[34] Let me first point out that except for the case of *Selva Kumar v. Thiagarajah (supra)* all the authorities cited relate to deposit paid or found to be paid under an agreement in dispute. They do not deal with part payment of a consideration in an agreement. There is apparently a difference between deposit and part payment towards a consideration. This distinction is highlighted in the Privy Council judgment of Lord Hailsham in *Linggi Plantations Ltd v. Jagatheesan (supra)* where he said:

> In particular Lord Dunedin in *Mayson v. Clouet* [1924] AC 980 establishes the fundamental difference between part payments which are recoverable in certain circumstances and deposits which are not.

[35] *Mayson v. Clouet (supra)* is a Privy Council decision arising from the Supreme Court of the Straits Settlements in Singapore. The respondents who were developers entered into an agreement to sell a building to be constructed by them to one Sim Choon Kee. The purchase price was $250,000. A sum of $25,000 as deposit was paid immediately after the signing of the agreement. The balance was to be paid in this fashion: 10% of the balance within three months from date of agreement; a further 10% of the balance within six months from date of agreement and; the balance within ten days of the production by the respondent of a municipal certificate stating that the building is completed. Clause 3 of the agreement provides that in the event of either of the two installments of 10% is not paid, the respondents are at liberty to cancel the agreement and all money paid to them shall be forfeited. But under cl. 13 of the agreement, if the purchaser shall neglect or fail to comply with the above conditions his deposit may be treated as forfeited and the vendors shall be at liberty to re-sell the said property.

[36] The deposit and the two instalments were paid by Sim Choon Kee but not the balance of the purchase price. The respondents terminated the sale and forfeited all sums paid under the agreement. Upon the death of Sim Choon Kee, his estate demanded from the respondents the return of the two instalments of 10% each though conceding that the respondent could forfeit the deposit paid at the time when the agreement was signed.

[37] The Privy Council reversing the decision of the court below held that the right of the parties depended upon the contract, and although the purchaser was in default, the instalments were recoverable since the contract distinguished between the deposit and the two instalments. Forfeiture is only for the deposit.

[38] In this judgment of the Privy Council, the case of *Howe v. Smith* [1884] 27 Ch D 89 was cited with approval by Lord Dunedin who said:

> *Howe v. Smith* clearly comes to this, that if the learned judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return.

[39] The facts of *Howe v. Smith (supra)* are these: In a sale of a real estate, the purchaser paid a sum of £500 which was stated in the contract to be "a deposit, and in part payment of the purchase money". The purchase price was £12,500. A date for completion of this sale was fixed and the agreement stipulated that if the purchaser fails to complete, the vendor should be at liberty to resell and to recover any deficiency in the price as liquidated damages. When the purchaser could not complete the contract the vendor resold the property at the same price. This prompted the purchaser to bring an action against the vendor for specific performance of his contract with the vendor. This was dismissed by the court of first instance as well as on appeal. However, the Court of Appeal allowed the purchaser to amend his pleading to claim for the return of the deposit. The issue before the court was whether the sum of £500 paid as deposit and in part payment ought to be returned. It was here that the distinction between deposit and part payment is established as well as its consequences.

[40] As part payment cannot be subjected to forfeiture as compared to a deposit, I would consider all cases cited by the respondent (except *Selva Kumar v. Thiagarajah (supra)*) distinguishable since they dealt specifically with deposit or the subject matter involved is clearly that of deposits. As I have said, *Selva Kumar v. Thiagarajah (supra)* is the only case cited which does not carry the word deposit in the agreement between the parties.

[41] The facts in *Selva Kumar v. Thiagarajah (supra)* are these: The parties were medical practitioners. The respondent who owned a clinic was desirous of selling it to the appellant for a sum of RM120,000. An Agreement was entered into where the appellant paid to the respondent RM12,000 at the time of signing. He then paid a further sum of RM48,000. The balance of RM60,000 was to be paid by 15 monthly instalments of RM4,000 each. However, after the appellant had paid up to RM96,000 he refused to proceed further to pay the remaining six monthly

instalments. The respondent sought to forfeit RM96,000 by relying on a clause in the agreement which says that if the appellant defaults, all monies paid up to the date of the default would be forfeited as agreed liquidated damages and thereafter the agreement would terminate. At the High Court, the respondent obtained a declaration that this clause is valid and enforceable against the appellant. Dissatisfied, the appellant appealed.

[42] Allowing the appeal and ordering the return of RM84,000, the Federal Court laid down the following principles of law:

1. There is no distinction in Malaysia between liquidated damages and penalties as understood under the English law in view of s. 75 of the Contracts Act 1950 which provides that in every case the court must determine what is the reasonable compensation, 'whether or not actual damage or loss is proved to have been caused thereby' ('the words in question' which is found in s. 75 of the Contracts Act).

2. However, the words in question, *viz* 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

3. We hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote; then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the court's good sense and fair play.

4. Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words in question.

[43] Despite the word 'deposit' not being mentioned in the agreement, the Federal Court decided that "Apart from the real loss (which has not been proved), the vendor ought to be entitled, in any event, to forfeit any reasonable amount of earnest money or deposit. We have in our case, the deposit or earnest money, ie the sum of RM12,000 which was paid on signing the agreement by the purchaser to the vendor, see cl. 1(a)(i) of the agreement. The sum is equivalent to 10% of the purchase price and is part of the said sum of RM96,000 sought earlier to be forfeited by the vendor under cl. 1(a)(i) of the agreement. The sum of RM12,000, in all the circumstances of this case, is not too large to prevent it from being fully forfeitable. We would not interfere with it, and would allow the vendor to forfeit it or keep it".

[44] Having disclosed these principles of law, I now return to examine the facts in our instant case. Adopting the advice handed down by the Privy Council in *Linggi Plantations Ltd v. Jagatheesan (supra)*, as well as *Mayson v. Clouet (supra)*, I first look at the construction of the agreement itself. It is without doubt that this document was constructed to give an impression of a joint venture transaction when for all intent and purpose it was an outright sale and purchase of the said land for a consideration of RM15 million. Though this consideration is described as a "security deposit" the terms in the agreement do not reflect the true meaning of this phrase. If it is truly a security deposit then its objective must be to ensure the performance of certain obligations expected of the respondent. But what could this be in order to justify and commensurate the demand of such a generous sum? Except for the need of the respondent's best endeavour to apply for layout plans for the development of the said land (cl. 4(a) of the agreement) and to jointly evict the squatters from the said land (cl. 4(b) of the agreement), there is nothing else of significance required of the respondent to perform. These two obligations are minor in nature as compared to the work that must be undertaken by the appellant. And what would be the outcome of this security deposit after the undertaken acts of the respondent were duly performed? Instead of returning the security deposit to the depositor, the sum is to "be treated in full satisfaction of the landowner's right and interest in the said land" (cl. 13(b) of the agreement). If the respondent, as landowner, was to contribute said land in a joint venture, one would expect the respondent to surrender the said land to the appellant for a subsequent benefit. But instead, here, the respondent was to be paid up-front under

the guise of a security deposit which "shall be deemed to be unconditional payment by the landowner's share in the joint venture project ..." (cl. 2(a) of the agreement). Therefore considering the agreement as a whole, I would agree with Dato' Sethu's persistent and consistent stand that the agreement was an outright sale and purchase of the said land rather than one of a joint venture to develop the said land.

[45] Since the transaction was one of sale and purchase of land, then obviously the purchase price must be the RM15 million. How was this to be paid is clearly set out in cl. 2(a) of the agreement: RM200,000 considered paid upon execution of the agreement and RM14.8 million within 100 days thereafter. This entire method of payment must inevitably be construed as payment in parts with no deposit. If so, and going by the authorities stated, the respondent would not be entitled to any forfeiture. Realizing this short coming, Dato' Sethu immediately argued that the entire consideration of RM15 million stated in the agreement was the deposit. This could not be since he has maintained that this agreement was for a sale and purchase of the said land rather than a joint venture and, as I have said, the consideration for the entire sale was RM15 million. One cannot have the entire consideration as a deposit. If it is, then the true meaning of deposit is lost. Further, if the entire sum of RM15 million was the deposit, then why did the respondent not claim for this entire sum but rather only 10% of it. So obviously, by the nature of its claim, the respondent has resigned itself to the fact that the sum of RM15 million was the entire consideration rather than a deposit.

[46] When the amount stated therein was meant to be a part payment then going by the authorities of *Linggi Plantations Ltd v. Jagatheesan (supra)*, *Mayson v. Clouet (supra)* and *Howe v. Smith (supra)* it cannot be subjected to forfeiture. The innocent party is only entitled to sue for damages for breach of contract and damages has to be proved.

[47] Instead of proving actual damage or reasonable compensation for the actual loss suffered, the respondent chose to tag it to 10% of RM15 million and called no further evidence. Whether this is permitted requires an examination of the evidence to determine whether it falls within the exception expressed in *Selva Kumar v. Thiagarajah (supra)* which is: are the facts of this case within the limited or restricted situation where the court finds it difficult to assess damages for the actual loss or damage? The Federal Court

in *Selva Kumar v. Thiagarajah (supra)* cited *Chaplin v. Hicks* [1911] 2 KB 286 as a case in point where assessment of actual loss or damage is difficult to access.

[48] In *Chaplin v. Hicks*, Ms Chaplin, an actress, agreed with Hicks, a theatrical manager, for her to be present at a meeting with him to interview her and 49 other actresses where he would select 12 of them to be employed. He was in breach of contract for not giving Ms Chaplin a reasonable opportunity to attend the interview. It was also argued on his behalf in the Court of Appeal that only nominal damages were payable and the award of substantial damages by the High Court was wrong. The submission of nominal damages was to the effect that she would have had only a chance of one in four of being successful. The argument for nominal damages was rejected by the Court of Appeal and the High Court's award was upheld. Very clearly, Ms Chaplin failed to prove the damages for actual loss, ie the amount involved. The evidence in Ms Chaplin's case indubitably suggested a real loss, a loss that was not too remote, going by the rules in expounded *Hadley v. Baxendale* [1854] 9 Exch 341; [1843-60] All ER Rep 461, but at the same time it was quite difficult to assess the damages or the amount of money that should be given to her for such loss of such opportunity to be selected.

[49] In association with this case, Peh Swee Chin FCJ in *Selva Kumar v. Thiagarajah (supra)* said:

> In a good number of cases, rules for quantifying amounts of money for damages have evolved in courts for some but not all types of cases, in other words, a measure of damages for some of these cases has been respectively established, eg the measure of damages in a sale of goods being the difference between market value and contract price, etc. However, a measure of damages, ie a settled rule for assessing damage, has not been developed for cases of the type of Ms Chaplin's, and such measure for her case has still not been established.
>
> It would still be left to the good sense and fair play of the court to fix a reasonable amount as compensation. Thus, it will mean that for lack of an established measure of damages in any particular case, that case will be one in which the court finds it difficult to ascertain the amount of actual loss or damage. The court will not shirk its duty, however, when such actual loss or damage is manifested from the evidence and it is not too remote, to find a reasonable sum for the plaintiff.

[50] Following this, I am of the view that the circumstances of this case do not fall within the stated exceptions. The respondent could have adduced evidence to prove loss of bargain for holding the said land rather than selling it to a third party while waiting for the payment of the balance of the purchase price from the appellant, akin to an aborted sale and purchase of goods where evidence of loss would be the difference between market value and contract price or the loss of a profitable opportunity. I agree that sometimes this is cumbersome to prove and that is why the practice has grown to agree on the customary figure of 10% of the purchase price as a deposit which would be forfeited should the purchaser fail to complete the purchase. And the objective behind payment of a deposit seems to be this: The first is to act as a guarantee that the purchaser means business (per Lord MacNaghten in *Soper v. Arnold & Anor* [1889] 14 AC 429 @ 435). The second is to bind the vendor legally from disposing of the said property until the time for payment of the balance of the purchase price. And the customary sum of 10% of the purchase price seems to be that as stated by Justice Bokhary PJ in the Hong Kong Final Court of Appeal case of *Polyset Ltd v. Panhandat Ltd* (under appeal number 28 of 2000 delivered 25 February 2002):

> In Hong Kong as in many other parts of the world, a deposit representing 10 per cent of the purchase price of the land is conventional. If I were asked to account for the strict logic behind this percentage, I would have to answer that there is none that I know of and that there may be none that exists. I would augment or mitigate that answer by citing Mr. Justice Holmes's famous aphorism (in *"The Common Law"* [1881] at p. 1) that "The life of the law has not been logic: it has been an experience". Perhaps all that can really be said is that, for a long time and in many different places, 10 per cent has in practice enjoyed both legal and commercial acceptance as generally appropriate.

[51] But since no deposit is ever mentioned in our instant case and when actual loss or damage can be quantified by known and established measures then in absence of evidence to prove actual loss or damage, the respondent's claim for an aggregated sum of 10% of the consideration mentioned in the agreement should not be allowed. If at all any sum is to be forfeited, then it would only be the RM200,000 which was paid at the time of the execution of the said agreement. This could be considered as "deposit or earnest money", an approach adopted in *Selva Kumar v. Thiagarajah (supra)* by the Federal Court, which seized upon a sum

of RM12,000 paid by the defaulting party in an agreement and considered it as such despite there being no express description of this as deposit or earnest money. I am of the view that this course was adopted to do justice in that particular case rather than setting down universal legal principle for general application. To do so would compromise on established legal principles and open flood gates to those who prefer short-cuts in proving actual loss or damage.

Conclusion

[52] For these reasons, I allow this appeal but with no order as to costs here and below. Deposit for this appeal to be refunded to the appellant.

Zainun Ali JCA:

[53] Both the appellant (the developer) and respondent (the landowner) are companies with limited liability. The respondent is the landowner and the appellant is the developer.

[54] The parties had, on 20 November 1987, entered into an agreement (which they called a joint venture agreement), where the respondent for consideration of RM15 million, allowed the appellant to "develop the said land by building therein various types of building together with infrastructures, common facilities, convenience and other amenities in accordance with plans to be approved by the relevant authorities and subject to terms and upon the conditions hereafter contained."

[55] There were two (2) pieces of land which were alienated to the respondent from the Government. It is important to look at the language of the agreement, particularly with regard to the mode of payment of the RM15 million.

This was how it is to be paid:

(i) RM200,000 upon execution of the agreement;

(ii) a further sum of Malaysian Ringgit Fourteen Million Eight Hundred Thousand only (RM14.8 million) within one hundred (100) days from the date of the agreement,

and this consideration is to be known as the "Security Deposit." (my emphasis).

[56] It is also significant to note that the payment of the Security Deposit shall be deemed to be unconditioned payment of the landowner's share in the joint venture project payable by the developer to the landowner upon due observance and performance by the developer of all the covenants stipulations and undertaking on its part to be observed and performed herein.

[57] There were obligations imposed on both parties. The more significant ones affecting the respondent were that:

(i) The landowner under cl. 4(a) shall apply for and use its best endeavour to obtain the approval of layout plans for the development of the said land from the authorities ...

(ii) The landowner under cl. 4(b) shall be jointly responsible for evicting the squatters from the said land ...

[58] For doing these, the landowner was to get RM15 million and discount of 10% from the selling price offered by the appellant to the public.

[59] Should the landowner not exercise his entitlement at the final phase of the development, "the Security Deposit shall be deemed in full satisfaction of the landowner's right and interest in the said land." (cl. 13(b) agreement).

[60] And what of the appellant's obligation?

[61] The appellant has to pay the respondent the initial sum of RM200,000 which had since been paid. The appellant is to also pay the balance sum of RM14.8 million within one hundred days "from the date hereof (ie, the date of the agreement). The appellant must, at its own cost and expenses submit plans and build on the said land, including infrastructures and then sell those constructed buildings of which the appellant is to keep the entire purchase price from those sales.

The Appellant's Case

[62] It would appear from both the testimony and documentary evidence that the appellant tried to secure a bank loan after the agreement was signed. This bank loan is to pay respondent the balance due from appellant ie, RM14.8 million.

[63] However its banker MBF Finance Bhd informed the appellant that a company called Pembinaan dan Pemaju Malaysia (Selangor) Sdn Bhd (PPMS) had lodged a caveat on the said land. It transpired that PPMS had signed an earlier agreement with the respondent (on 26 May 1987) where PPMS was appointed the main contractor by the respondent. The PPMS loaned the respondent a sum of RM442,914 as consideration for this appointment.

[64] It is this PPMS Agreement which the respondent had entered into, which prompted the appellant to contend that the respondent had committed a breach of the fundamental term of the agreement which they both had signed (the appellant and respondent). According to the appellant, the existence of the PPMS Agreement had deprived the appellant the exclusive right to develop the said land.

[65] This is manifested when in its reply to the respondent for its failure to pay the balance of the security deposit of RM14.8 million, the appellant in a letter of 19 April 1989 stated that:

> The Joint Venture Agreement was not proceeded with by reason of your failure to surrender the Document of Title to the Bankers and for the rescission of the contract you have entered into with Pembinaan dan Pemaju Mahajiwa (Selangor) Sdn Bhd and further you have failed to refund the sum of RM300,000 to us by 12th June 1988 ...

[66] The said sum of RM300,000 was actually in reference to a purported loan of RM200,000 which was supposed to be given by the appellant under the agreement, to the respondent for payment of quit rent and other charges imposed on the land.

[67] The appellant did not pay the said charges. Instead the appellant requested that respondent company shareholders deposit their share certificates in the respondent company, with the appellant and in return, the appellant would lend RM200,000 to the respondent.

[68] However, though the share certificates were handed over to the appellant, the RM200,000 was not forthcoming from the appellant.

[69] However the rents and outgoings were duly paid by the respondent when a new group of shareholders took over the respondent.

[70] The real turning point for this case occurred when the appellant failed to pay the balance of the security deposit of RM14.8 million.

[71] Thus on 6 April 1989, the respondent by letter demanded from the appellant "full payment of this sum within 14 days failing which the agreement would be terminated and the sum equivalent to 10% of the security deposit forfeited."

The Respondent's Case

[72] The respondent's cause of action was founded on breach of contract by the appellant for non-payment of the balance of the security deposit of RM14.8 million, since it had complied with it's side of the bargain.

[73] The critical issues before this court are two-fold:

(a) which of the parties is guilty of breach of contract?;

(b) whether there is a right of forfeiture in the JVA and

If so, what is the quantum forfeitable?

[74] The appellant contend that it was the respondent who had breached the agreement when the respondent entered into the PPMS Agreement on 26 May 1987 with Pembinaan and Pemaju Mahajiwa (Selangor) Sdn Bhd making PPMS its "main contractor".

[75] Thus when, on 20 November 1987, the parties entered into an agreement (JVA), the respondent would provide the land and the developer was to have the right to construct building thereon, and take over all infrastructures works. The developer would sell the lands and appropriate all payments made by purchasers of the building.

[76] In return for this right to construct and develop and sell, the developer was to pay the sum of RM15 million to the landowner (respondent) within a period of 100 days from 20 November 1987.

[77] It was only in February 1989 that the appellant discovered the existence of a caveat over the land lodged by PPMS, when the appellant applied for a loan facility with MBF Finance Bhd. for the 'development' of the land.

[78] According to the appellant this transaction was unknown to the appellant at the time the JVA was executed on 20 November 1987 (about six months later). A

[79] The appellant contend that the respondent ought to have but did not, inform the appellant of this PPMS Agreement. And for this reason the respondent was in no position to and disabled itself from giving good consideration to the appellant for its payment of RM15 million. B

[80] The appellant contend that the entire JVA became "voidable" at the appellant's option for the total failure of consideration for as long as the contract between respondent and PPMS existed, since the appellant could not 'build' or 'develop' the land as envisaged by the parties. Moreover this was the sole consideration the respondent had to grant to the appellant, in exchange for payment of RM15 million. C D

[81] For the respondent, it was argued that there was good consideration because at the material time when the JVA was signed between appellant and respondent, although there was this agreement with PPMS, there was no caveat on the land at the material time. Thus the land was then unencumbered. Though there was a subsequent caveat, the respondent had it removed by order of court. E

[82] The respondent, as did the learned trial judge, found that appellant was in breach for non-payment of the deposit and quit rent. In any case, payment is a fundamental term and even if time originally fixed had ceased to be of the essence, the appellant can reimpose time which it did. F

[83] The appellant had also stated that the respondent had failed in its obligation since by virtue of the caveat, it was unable to charge the land. The appellant's purpose for the charge in question was to take out a loan to pay the respondent the balance sum of the security deposit. G H

[84] Be that as it may, in view of these conflicting issues, the appellant argued that it is allowed to now raise the point of "failure of consideration" for the first time on appeal. The appellant says total failure of consideration renders the JVA voidable with restitution under ss. 65 and 66 (Contracts Act 1950) or affirmation thereof with damages for breach of contract under the Act. I

The authorities referred to were:

(1) *Fibroska Spolka Keyjna v. Fairbairn* [1943]

(2) *Koh Siak Poo v. Sayang Plantation* [2002] 1 CLJ 501

[85] The appellant contended that on this ground of total failure of consideration, the appellant as the innocent party had one of 2 choices:

(i) He could treat the contract as at an end and seek refund of all monies paid; or

(ii) he may rest his claim on the basis of the contract and seek damages for breach.

[86] More importantly it is the appellant's contention that the respondent's ability to forfeit 10% of the deposit is irrelevant because no forfeiture can be made on a void/voidable agreement. The appellant says it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA.

[87] In addition the appellant contended that the respondent was in breach of fiduciary duties, entitling the appellant to general damages.

[88] One fact must not be lost sight of. It is this. The appellant, upon discovery of the caveat staged a protest in correspondences with the respondent. If there was a breach by the respondent in this regard, the appellant chose not to terminate the JVA, neither did it rescind the JVA for alleged misrepresentation. The end result was that, the appellant conceded to appoint PPMS as it contractor in the joint venture project.

[89] The other question raised by the appellant was with regard to the charge to secure the loan to pay the security deposit. The appellant laid blame squarely on the respondent, when the appellant could not obtain the loan due to the caveat. On this point, I have this to say: Reading cls. 5 and 2(a) of agreement, there is nothing to suggest that the creation of a charge is a condition precedent for the payment of the balance of the security deposit. In other words, the payment of the security deposit was not conditional upon the creation of the charge. In fact cl. 4(c) make the payment of deposit a condition precedent before the

grant of the power of attorney to the appellant to create a charge: In short, the obligation to create the power of attorney only arose "upon full payment of the security deposit". A

[90] To top it all, there is nothing in cl. 5(c) to suggest that the loan is to pay the security deposit. B

[91] The way I see it, there was a misconception on the appellant's part with regard to the contract with PPMS. This contract was not an encumbrance binding on the land but a personal obligation. In any case, that contract with PPMS was inchoate, subject to further terms and conditions [Para (3)]. C

[92] In the context of this case, it is instructive to also look at the conduct of parties.

[93] It is clear that the appellant was either unsure of what to do after signing the JVA, or that it was in a dilemma of sorts, after obtaining legal opinion from Tetuan Shearn Delamore & Co. D

[94] Even the appellant's own witness DW1 (Dato' Chan) could not give an intelligible reply during cross-examination as to why the appellant had wanted to revoke the agreement on the same day it was signed. E

[95] The appellant, if it truly believed the respondent was in breach of the agreement could exercise any of its options. They never did. Instead, the appellant applied to re-negotiate new terms especially towards payment of the security deposit. F

[96] The appellant had asked for several extensions to pay the balance of the security deposit and thereafter, fixed extensions were given. G

[97] The respondent granted an extension of 30 days from the expiry of the original 100 days from 20 November 1987 which should expire on 29 February 1988 and a further 30 days which expired on 29 March 1988. H

[98] Still, the balance was not paid on 29 March 1988. The appellant sought a further extension of 30 days which expired on 28 April 1988.

[99] However before 28 April 1988 was up, the parties met on 8 April 1988 and the respondent agreed to an extension of 75 days to "expire on June 1998 at midnight". This was an extension of fixed time. I

[100] The appellant accepted the extension on terms that a supplementary agreement was drawn up. When no payment was forthcoming from the appellant, the appellant proposed changes to the agreement which the respondent rejected. However the continued negotiations did not alter the appellant's primary obligations in the JVA but merely postponed it. So when no payment was made, the respondent demanded the payment of the balance of the security deposit by its letter dated 6 August 1989, within 14 days.

[101] This made time the essence of the contract. The appellant replied that the agreement can only be terminated if the initial payment of RM200,000 was refunded. I find this suggestion baseless.

[102] In fact, what I do find is that by making the proposal, for the execution of a new joint venture agreement, on new terms and conditions the appellant clearly evinced an intention that it was not able to and did not want to perform the earlier agreement and this amounts to a clear repudiation. Yet the appellant did not repudiate the agreement.

[103] Now I come to the heart of the matter. If it is proven that there is breach on the part of the appellant, can the respondent forfeit the deposit? And if so, how much is forfeitable?

[104] As I said earlier the appellant's contention is that it is inequitable for the respondent to demand forfeiture when its own conduct brought about the breach of the JVA, by suppressing material facts, making performance impossible.

[105] The appellant's entire case was that the termination was wrongful and there was no liability for forfeiture but that in fact the respondent itself was in breach of its fiduciary duties and that the respondent was liable to compensate the appellant.

[106] At the risk of repetition, I need to reiterate here that it was the appellant's case that the balance of the security deposit was only payable after the creation of a charge.

[107] I do not agree with the appellants' contention. There is nothing in cl. 5 or 2(a) to suggest this, since these are independent obligations.

[108] In fact in construing the relevant clauses in the agreement, ie, cls. 5 and 2 (a) and having seen evidence of parties, it is clear that time for payment of the deposit is fixed, whereas there is no time fixed for creation of the charge which inevitably negatives the suggestion of a condition precedent.

[109] This inability to get the loan means that the deposit sum was unpaid.

[110] But what would be the situation if the deposit sum is unpaid? In the instant appeal, the appellant had only paid RM200,000. Perusing authorities on this point, it is shown that even where the deposit sum is unpaid, the respondent can still terminate, forfeit and sue to recover that sum. (See *Pendergrast v. Chapman* [1988] 2 NZLR 177, *Bots v. Ristevski* [1981] VR 120 (2 IA/R) p. 81 headnote; *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 2 CLJ 23.

[111] In the circumstances, the respondent can rightly sue for recovery of the deposit even though it remains unpaid.

[112] After all that has been said, the meaning of "deposit" now writs large. James LJ in *Ex p Barrel* LR 10 Ch 512 observed that:

> ... The deposit as I understand it ... is a guarantee that the contract shall be performed ... If the sale goes on, it goes in part payment of the purchase money for which it is deposited, but if on default of the purchaser the contract goes off, that is to say if he repudiates, the contract, then he can have no right to recover the deposit.

[113] A succinct definition of 'deposit' was also stated by Lord MacNaghten in *Soper v. Arnold* [1889] 14 App Cas 429 where he said:

> ... A deposit is defined as serving two purposes, that is, if the purchase is carried out, it goes against the purchase money. But the primary purpose for the deposit is to act as a guarantee that the purchaser means business ...

[114] Coming back to the instant appeal, the issue arose as to whether the sum to be forfeited is the RM200,000 initially paid, or 10% of the entire consideration of RM15 million. An important corollary to that issue is, why should the court take 10% of the consideration of the deposit as forfeiture, not 20% or 30% as the case may be.

[115] Firstly, a careful reading of the joint venture agreement on 20 November 1987 would show that the agreement makes it clear why the entire purchase consideration was made a security deposit. As is clear, the title carried a restriction that there can be no charge or transfer without the State consent.

[116] The relevant clauses which manifest the legal position can be found in cl. 2(a) and cl. 4(c) which requires respondent to execute an irrevocable power of attorney to the appellant including power to create a charge; cl. 5(a) empowers the appellant to raise loans on a security of the land and cl. 10 enables the appellant to sell the developed units to third parties, but the respondent as landowner must be a party.

[117] Thus these provisions enable the appellant to deal effectively with the land with third parties. However by these acts, the respondent could or would have lost the land, in the event of the appellant's default. The said land would not be reverted to the respondent since the rights of third parties would have intervened.

[118] In this context, it is no surprise therefore that the agreement provides that the entire consideration had to be paid as a security deposit so as to protect the respondent against any default by the appellant and consequent loss of the land.

[119] Given the risk that the respondent is exposed to, there is nothing unusual in the entire sum being agreed by both parties as a "security deposit" ie, the amount of RM15 million.

[120] However the word "deposit", innocuous as it looks, has a technical life of its own, and thus a careful look at its definition and construction is necessary.

[121] Is there a difference between the word "deposit" and "true deposit?" The word "true deposit" means a deposit which is within the bounds of an earnest performance. (Since essentially a forfeited deposit serves as an earnest of performance).

[122] In fact the majority decision in *Morello Sdn Bhd v. Jacqaues (International) Sdn Bhd* [1995] 1 MLJ 581, said that:

> In considering the question what was expressly stipulated as a deposit in the agreement was a true deposit, we have paid due regard to the terms of the agreement as a whole, and the surrounding circumstances.

[123] Consequently if a deposit is a true deposit, it will be forfeited to the vendor if the purchaser wrongfully fails to perform his part of the bargain. This is so even if the 'vendors' loss is less than the deposit. This is so even if the vendor suffers no loss at all. The test normally accepted to ascertain whether a sum is within the bounds of an earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. (See *Sun Properties Sdn Bhd v. Happy Shopping Plaza* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345).

[124] In the instant appeal whether 10% of the "security deposit" in the agreement is a true deposit depends on the construction of the contract between the parties.

[125] Though in some cases such as *Linggi Plantation v. Jagatheesan* [1972] 1 MLJ 89 the court would grant relief against forfeiture of a deposit, there may be instances where the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun.

[126] Where a deposit is reasonable, it has always been regarded as a true deposit, namely a guarantee of performance as well as part payment on account and that the court will not regard a forfeiture of such payment as a penalty.

[127] It has been suggested that in the instant appeal, a distinction need be drawn between a deposit simpliciter and part payment of a consideration.

[128] Most of the authorities cited in the instant appeal relate to deposit paid or found to be paid under an agreement between parties in dispute.

[129] They do not actually deal with part payment of a consideration. But whether the subject matter under consideration is not a deposit but a part payment towards money consideration really turns upon the construction of the contract between the parties.

[130] For our purposes here, the question is – Is there a distinction between a deposit and part payment for purchase of land, for example?

[131] Lord Hailsham in *Linggi Plantations* said that:

A In particular Lord Dunedin in *Mayson v. Clouet* [1924] AC 980 establish the fundamental difference between part payments which are recoverable in certain circumstances or deposits which are not.

[132] In *Mayson v. Clouet*, the Privy Council in reversing the decision of the court below held that the right of the parties depended upon the terms of the contract and intention of parties. It is my view that this is the lynchpin to this whole issue.

[133] So in *Mayson*'s case, although the purchaser was in default, the installments were recoverable since the contract itself makes a distinction between the deposit and the two installments, where the forfeiture is only for the deposit.

[134] In short, the character of the payment depends on the parties' intentions to be obtained by construing the agreement. *(Mayson v. Clouet)*. Or as the majority decision in *Morello* said, in determining whether money has been paid by way of deposit or by way of part payment, considerable weight is to be given to the label attached by the parties to the payment (See *Howe v. Smith* [1884] 27 Ch. D 89. I am in complete agreement with Edgar Joseph Jr. FCJ (as he then was) when His Lordship said:

> Especially is this so in a case such as this where the agreement had been entered into by two incorporated companies, engaged in trade, both commercially autonomous fully informed of all the relevant facts, with free access to legal advice and having regard to the degree of formality in the wording of the agreement.

[135] In *Morello*'s case, there is cl. 3 which expressly provides for an initial payment of RM116,700 by way of "deposit to be paid upon signing of the contract." The seller however agreed to accept late payment of the deposit.

[136] The Federal Court in *Morello* said that this "unpaid" deposit did not lose its character as a deposit and the seller sought recovery of the unpaid deposit, which the court allowed.

[137] Similarly in the instant appeal, the appellant chose not to pay the "security deposit" according to the terms of the JVA. The appellant only paid the initial RM200,000. Is the respondent to be in any worse position just because the deposit was not paid when the time came for it to be paid?

[138] Looking again at the JVA, the security deposit is described as "unconditional payment" of the respondent's share in the joint venture project payable by the appellant.

[139] Thus in *Bot v. Ristevski* [1981] VR 120, Justice Brooking sitting in the Supreme Court of Victoria held that when a vendor had terminated a contract by accepting the purchaser's repudiation, he would be entitled to recover an unpaid deposit on the ground that in such a situation there will have been no failure of consideration since the consideration for the deposit was not the conveyance but the entering into the contract." (per Edgar Joseph Jr JCA in *Morello*'s case).

[140] Likewise in the instant appeal.

[141] Following the principle as found in *Morello* decision, money paid as a deposit cannot be paid on some terms implied or expressed. And monies to be paid as the event of the contract being performed shall be so paid. The monies to be paid in the instant appeal is not merely a part payment, it is also an earnest to bind the bargain so entered into.

[142] Coming back to the instant appeal, the contract clearly describes both payments as "security deposit". Thus the entire amount is the deposit. Both the appellant and respondent have their respective obligations under the agreement. Whether one party's obligation is more onerous than the other is of little consequence. What is important is what is their intention as manifested in the agreement?

[143] As had been expressed earlier, in view of the rights and obligations of the parties and the risk imposed on the respondent against any default by the appellant, and upon a plain reading of the agreements there is no doubt that RM1.5 million represent a true deposit and that the respondent is entitled to forfeit the sum when the appellant failed to comply with cl. 2(a) of the agreement.

[144] Much was said by the appellant about there being no right of forfeiture in the agreement. However I find that an express provision for forfeiture is not an essential component. This is a contract of sale, where a deposit being an earnest for performance of a contract, confers a consequential right of forfeiture (subject to its constructions and terms and conditions).

[145] Again, at the risk of being repetitive, the critical factor is the character of the payment which is largely dependent on the parties' intention, ascertained by construing the agreement. This view finds support in authorities such as *Polyset-Pendergrast v. Chapman* [1988] 2 NLLR 177 and *Damon Cia Naviera v. Hapag-Lloyd* [1985] 1 All ER 475.

[146] In *Polyset Ltd v. Panhandat Ltd* [2002] 3 HKLRD 319 Bokhary PJ in setting out the facts said that four sums were paid in advance. The first sum was described as "deposit and part payment". The three subsequent payments were also similarly described, the only difference is that they have inserted the word "further" – which now read as "further deposits and part payments."

[147] Thus in *Polyset*, as in the instant appeal, both payments, *albeit* the entire consideration were described as "security deposit".

[148] Thus it is for the parties to define what sum constitutes a deposit under the contract. In dealing with this point, Ribeiro PJ in *Polyset* observed that:

> ... distinguishing between deposit and mere advance payment: that the nature or legal incidents of a deposit can be defined. The character of the payment depends on the parties' intention ascertained by construing the agreement ...

[149] So is 10% a reasonable sum to be forfeited from the entire amount of RM15 million? On this point in *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89 the Privy Council imported a test of reasonableness.

[150] Lord Browne-Wilkinson observed, *inter alia* that:

> ... In order to be reasonable a true deposit must be objectively operating as "earnest money" and not as a penalty.

[151] Thus, the reasonableness of a deposit is to be tested against the conventional or customary level of deposits generally taken as an earnest of performance.

[152] As manifested in various authorities, the test normally accepted to ascertain whether a sum is within the bounds of as earnest of performance and therefore deemed a true deposit is where it represents 10% of the purchase price of the land. In

short, it's conventionally accepted that a deposit of 10% is a true deposit. (See *Sun Properties Sdn Bhd v. Happy Shopping Plaza* [1987] 2 MLJ 711).

[153] As case laws in various jurisdictions have shown, a deposit of 10% of the purchase price is quite commonplace and has enjoyed widespread commercial approval and acceptance.

[154] So too, in the instant appeal. I am of the view that the respondent is entitled to a forfeiture of 10% of the total consideration of RM15 million, discounting the RM200,000 already paid.

[155] For the above said reason, I dismiss this appeal with costs and deposit to account for taxed costs.

[156] My learned brother Mokhtar Sidin JCA has seen this judgment in draft and is in agreement with it.